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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, DC 20554

Dear Mr. Caton:

Enclosed herewith for filing are an original and eleven copies of the corrected version of the Comments of Vanguard Cellular Systems, Inc. This version corrects several errors that occurred during the final production of the comments. Please replace the version filed on October 20 with this corrected version.

If you have any questions regarding the enclosed revised version, please contact the undersigned.

Respectfully submitted,



J.G. Harrington

JGH/dmc

Enclosures

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OCT 23 1997

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 ) CC Docket No. 97-208  
Application of BellSouth Corporation, )  
BellSouth Telecommunications, Inc. and )  
BellSouth Long Distance, Inc. )  
Pursuant to Section 271 of the )  
Telecommunications Act of 1996 to Provide )  
In-Region, InterLATA Services in )  
South Carolina )

COMMENTS OF  
VANGUARD CELLULAR SYSTEMS, INC.

Werner K. Hartenberger  
J.G. Harrington  
Cécile Neuvens

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October 20, 1997

## SUMMARY

BellSouth's request for the Commission to treat South Carolina as a "laboratory" for its theories about the interaction of local and long distance telephone markets cannot be granted. The Commission may not and should not engage in such experiments, but instead must require the requesting BOC to comply fully with each of the requirements of Section 271 before granting any application for in-region interLATA authority. Because BellSouth has not met those requirements and because BellSouth's entry into the interLATA market would pose significant competitive risks, its application must be denied.

First, BellSouth has not qualified to submit this application under either "Track A" or "Track B" of Section 271(c)(1). Track A is unavailable because, as BellSouth admits, there is no facilities-based provider of residential and business local telephone service in South Carolina. Track B is unavailable because there have been literally dozens of qualifying requests for interconnection in that State. BellSouth's theory that Track B should be available because no potential competitor is taking "reasonable steps" to enter the market is belied not only by the statute, but by the facts. The requests for interconnection, the interconnection agreements that have been reached, the applications for certification that have been filed and granted, the requests for unbundled elements, the implementation of interconnection trunks and the requests for collocation in South Carolina all demonstrate that reasonable steps are, in fact, being taken towards facilities-based competition.

Even if BellSouth could proceed under Track B, it has not met the checklist requirements of Section 271(c)(2)(B). BellSouth admits as much when it states that it has not complied with the Commission's *Michigan Order*. BellSouth also improperly relies on

interim prices for checklist elements. At the same time, BellSouth refuses to comply with its obligation to pay transport and termination charges for calls to enhanced services providers, demonstrating that it intends to continue to leverage its bottleneck monopoly over the local telephone marketplace in South Carolina. Each of these flaws is sufficient, by itself, to require denial of BellSouth's application.

Moreover, BellSouth has not demonstrated that it will comply with its separate subsidiary obligations under Section 272. If nothing else, the Commission should require a showing that the costs of this application are being allocated properly, *i.e.*, to the long distance subsidiary, before determining whether BellSouth meets this requirement.

Finally, BellSouth fails the public interest test. BellSouth was found to have acted anticompetitively by two different regulatory agencies in the MemoryCall cases. The MemoryCall experience is particularly probative because BellSouth proposes to repeat its unlawful "unhooking" practice in the long distance market. This behavior is part of a pattern that includes BellSouth's efforts to evade the requirements of the *Michigan Order* and to avoid its obligation to pay terminating compensation for calls to disfavored classes of users. Because improvidently granted applications for interLATA authority will create significant risks to competition and to consumers, it is critical for the Commission to ensure that the public interest will in benefit from the grant of before it permits BellSouth to enter the interLATA market in South Carolina.

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Before the  
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In the Matter of )  
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Application of BellSouth Corporation, ) CC Docket No. 97-208  
BellSouth Telecommunications, Inc. and )  
BellSouth Long Distance, Inc., for )  
Provision of In-Region, InterLATA )  
Services in South Carolina )

To: The Commission

**COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.**

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits these comments in response to the above-referenced application of BellSouth to provide in-region interLATA service in South Carolina.<sup>1/</sup> As shown below, the application cannot be granted.

**I. INTRODUCTION**

BellSouth urges the Commission to use South Carolina as a "laboratory" in "let[ting] market forces jumpstart competition in . . . interLATA services<sup>2/</sup> Section 271 does not, however, permit the Commission to engage in experiments, even if such experimentation did not entail the risks that would result from granting the BellSouth application. Rather, the Commission must

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<sup>1/</sup> See Comments Requested on Application By BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in South Carolina, *Public Notice*, CC Dkt. No. 97-208, FCC 97-2112 (rel. Sept. 30, 1997). For convenience of reference, Vanguard will use the term "BellSouth" to refer to the applicant entities collectively.

<sup>2/</sup> BellSouth Brief at i.

require strict compliance with the each of the requirements of Section 271, and BellSouth has not met that test.

Section 271 of the Communications Act, as amended by the Telecommunications Act of 1996 (the "Act"), prohibits the provision of in-region interLATA services by Bell operating companies ("BOCs") until, as measured by their compliance with certain specific requirements, the BOCs have established genuine conditions of facilities-based competition in their local exchange service markets. Before authorizing the provision of in-region interLATA services, the Commission must, under Section 271 of the Act, find that the BOC has met each element of a four-part test. *First*, the BOC must have either (i) entered into one or more state-approved binding interconnection agreements specifying the terms and conditions on which it is providing access and interconnection to a competing facilities-based provider of local exchange service or (ii) if no request has been made for access and interconnection, obtained state approval of a statement of the terms and conditions on which the BOC generally offers to provide such access and interconnection. *Second*, the Commission must find that the BOC has fully implemented or offers access and interconnection in accordance with the 14-point competitive checklist described in Section 271 (c)(2)(B). *Third*, the applicant must demonstrate that it complies with the separate subsidiary requirement under Section 272. *Fourth*, the Commission must determine that the authorization is consistent with the public interest, convenience and necessity.

A BOC must present a *prima facie* case that Section 271 requirements have been satisfied. A BOC must support its application with actual evidence demonstrating actual compliance; promises of future performance have no probative value in demonstrating such compliance.



As one of the largest independent cellular carriers in the country, serving more than 625,000 customers in 29 cellular MSAs and RSAs in 10 states, Vanguard has a vital interest in ensuring that BellSouth, as an ILEC, meets its obligations under Section 271. Vanguard has been providing cellular services since 1984 and, consequently, has long experience with the tactics of incumbent local exchange carriers ("ILECS") in interconnection negotiations and in implementation of interconnection agreements. Vanguard is one of many carriers that were deprived of compensation for terminating calls from ILECs from the inception of cellular service until the commission required ILECs to pay such compensation in its 1996 *Local Competition Order*.<sup>3/</sup> During that time, Vanguard was an active participant in cooperative efforts by cellular carriers to negotiate cost-based interconnection agreements. While these efforts resulted in lower interconnection charges, they were unsuccessful in negotiating rates that actually were cost-based or that were reciprocal. Thus, Vanguard has significant experience with ILEC attempts to avoid paying reciprocal compensation. In addition, Vanguard has an interest in this proceeding as a potential competitive LEC. As an existing carrier with facilities, including switches, in place, Vanguard could be a competitor to ILECs in its service territory. Vanguard's ability to compete, however, depends greatly on its ability to obtain fair terms and conditions of interconnection, which also are central to the Commission's Section 271 determination.

As shown below, BellSouth's application is deficient in several key respects. Most importantly, the application does not comply with the *ratio legis* of Section 271. Section 271

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<sup>3/</sup> See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499-16044 (1996) (the "*Local Competition Order*").

clearly requires that BOCs open their local markets to competition *before* they are authorized to enter the in-region long distance market. The Commission has reiterated this obligation in its *Oklahoma Order*<sup>4/</sup> and described the policy underlying the obligation in its *Michigan Order*.<sup>5/</sup> In fact, BellSouth expressly concedes that there are several areas, including "pricing, combinations of unbundled networks and certain OSS performance measurements and standards" in which it is unwilling to comply with the Commission's requirements but nonetheless requests that the application be granted on the basis of its "good-faith commitment to satisfy the local market requirements of the checklist and the 1996 Act."<sup>6/</sup> However, a "good-faith commitment" to foster competition in the local market is not the standard under which a BOC's application to provide interLATA services is to be assessed.

There are several other significant flaws in BellSouth's application. BellSouth does not meet the conditions to proceed under Track B and plainly misinterprets the Commission's determination regarding the applicability of Track A and Track B. Even if BellSouth had met the requirements for proceeding under Track B, it has not fulfilled its obligation to make

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<sup>4/</sup> Application by SBC Communications, Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, *Memorandum Opinion and Order*, CC Docket No. 97-121, FCC No. 97-228 at ¶ 55 (rel. June 26, 1997) ("*Oklahoma Order*").

<sup>5/</sup> Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, *Memorandum Opinion and Order*, CC Docket No. 97-137, FCC No. 97-298 (rel. August 19, 1997) ("*Michigan Order*"). *Id* at ¶ 18: "BOC entry into the long distance market would be anticompetitive unless the BOC's market power in the local market was first demonstrably eroded by eliminating barriers to local competition".

<sup>6/</sup> BellSouth Brief at 20.

checklist items available. BellSouth also has not demonstrated that the public interest would be advanced by granting this application, especially in light of its previous behavior. BellSouth even fails to demonstrate that it is complying with the subsidiary requirement of Section 272. Thus, BellSouth's application cannot be granted.

Moreover, Track A is mutually exclusive with Track B. Therefore, if BellSouth claims that it may proceed under Track B, it cannot demonstrate, or attempt to demonstrate, that it is possible that it has satisfied Track A as well.<sup>7/</sup>

## II. BELLSOUTH MAY NOT PROCEED UNDER TRACK B

BellSouth has filed its application under Section 271(c)(1)(B) of the Act, commonly referred to as "Track B." However, BellSouth does not meet the conditions for filing an application under Track B. The Commission need not rely on statements by other parties to reach this conclusion: BellSouth's application contains the proof that Track B is not available.

### A. Track B Is Available Only Under Specific Limited Conditions.

The purpose of Track B is "to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because *no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market*".<sup>8/</sup> The Commission found in the *Oklahoma* Order that Congress intended Track A to remain the

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<sup>7/</sup> BellSouth Brief at 16.

<sup>8/</sup> H.R.Conf. Rep. No. 104-458 ("Conference Report") at 148 (emphasis added).

primary vehicle for BOC entry in Section 271.<sup>9/</sup> Therefore, BOCs are permitted to proceed under Track B only when no facilities-based carrier has sought to enter the market and, for that purpose, has made a "qualifying request" for access and interconnection, *i.e.* a request that, if implemented, will lead to the provision of competing local telephone service to residential and business consumers in a way that satisfies the requirement of Section 271(c)(1)(A). Section 271(c)(1)(B) also provides that a BOC shall be considered not to have received a qualifying request under Track A (and shall thus be authorized to proceed under Track B), when the requesting carrier either fails to negotiate an agreement with the BOC in good faith or fails to comply, within a reasonable period of time, with an implementation schedule contained in the agreement.<sup>10/</sup>

Moreover, the Commission confirmed in its *Oklahoma Order* that Congress envisioned the existence of a "ramp-up" period during which good faith negotiations are taking place, interconnection agreements are being reached and the requesting carriers are becoming operational by implementing their agreements<sup>11/</sup>. Congress understood that there often would be a period of time when Track B is unavailable to BOCs although all the requirements of Section 271(c)(1)(A) are not satisfied yet. Therefore, once a BOC receives a qualifying request for negotiation from a CLEC, the BOC no longer is eligible to proceed under Track B unless the State commission certifies that the requesting carrier failed to negotiate in good faith or violated

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<sup>9/</sup> *Oklahoma Order* at ¶ 41.

<sup>10/</sup> *Oklahoma Order* at ¶¶ 37, 59.

<sup>11/</sup> *Oklahoma Order* at ¶¶ 43, 45.

the terms of an agreement by failing to comply with a negotiated or arbitrated implementation schedule.

Neither does Section 271 impose any obligation on requesting carriers to take "substantial," or even merely "reasonable" steps towards implementation of Track A. Section 271 does not impose any requirements on requesting carriers other than that requesting carriers (i) negotiate their interconnection agreement with BOC in good faith and (ii) abide by the implementation schedule contained in the agreement, if any. Therefore, unless a specific implementation schedule was established, the requesting carrier is not expected to take any specific action towards the implementation of Track A and, contrary to BellSouth's assertion, BellSouth cannot proceed under Track B on the basis that requesting carriers have failed to take reasonable steps towards providing facilities-based local competition.<sup>12/</sup> On the other hand, Section 251 does require BellSouth and all other BOCs to take reasonable steps to open the local exchange service market to competition.<sup>13/</sup>

As shown below, BellSouth is exactly in the position where it is no longer entitled to invoke Track B, because agreements have been requested by and negotiated with competing carriers and these carriers are in the process of becoming operational at the time of the request. Therefore, BellSouth cannot rely, in South Carolina, on a state-approved statement of generally available terms.

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<sup>12/</sup> BellSouth Brief at iii, 4 and 10.

<sup>13/</sup> *Oklahoma Order* at ¶ 44.

**B. BellSouth's Application Demonstrates That There Have Been Many Qualifying Requests.**

In its Brief, BellSouth admits that it has executed agreements with 83 different telecommunications carriers in South Carolina.<sup>14/</sup> The South Carolina Public Service Commission (SCPSC) has reviewed and approved 66 of these agreements.<sup>15/</sup> The brief also acknowledges that all the agreements, except for the one with AT&T, were completed without the need for arbitration. Moreover, 26 of these agreements are with carriers that intend to be facilities-based, not including PCS providers.<sup>16/</sup> The brief also mentions that at least three entities intend to provide facilities-based services.<sup>17/</sup>

According to Mr. Wright, twenty-eight companies have sought certification from the SCPSC to provide competitive local exchange services in South Carolina.<sup>18/</sup> Nine of these companies have signed agreements with BellSouth that will allow facilities-based competition. Seven of the potential facility-based providers already have been approved by the SCPSC and certified to provide local exchange services as of September 19, 1997.

Finally, BellSouth does not allege, and the SCPSC does not certify under Section 271(c)(1)(B), that requesting carriers did not negotiate in good faith or have failed to abide by their implementation schedule, to the extent that one was contained in the agreements. Thus,

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<sup>14/</sup> BellSouth Brief at 5.

<sup>15/</sup> Affidavit of Mr. Gary M. Wright at ¶ 6.

<sup>16/</sup> *Id.* at ¶ 6.

<sup>17/</sup> BellSouth Brief at 13.

<sup>18/</sup> Wright Affidavit at ¶ 7

Bell South has not availed itself of either of the exceptions under Section 271(c)(1)(B). In sum, BellSouth has not, and cannot, comply with the requirements for invoking Track B.

**C. Even If the Commission Adopted BellSouth's "Reasonable Steps" Standard, the Requesting Carriers Would Meet that Standard.**

BellSouth, apparently recognizing that it cannot meet the requirements of Track B under the statute, argues Section 271 contains an implicit exception permitting BOCs to obtain in-region interLATA authority when potential competitors are not taking "reasonable steps" towards entering the marketplace.<sup>19/</sup> As shown above, the plain language of Section 271(c)(1)(B) does not admit of such a possibility. More important, even assuming that Track A does require potential competitors to take reasonable steps towards implementing facilities-based local competition, there is no reason to give any deference to BellSouth's self-serving assertions that no competitor is making reasonable progress, especially when those assertions are, in most cases, based merely on speculation by BellSouth and not on statements from, or activities by, the competitors in question. Indeed, the facts provided in BellSouth's application contradict its claim.

As the Commission recognized in its *Oklahoma Order*, "potential competitors must accomplish a number of things before they may begin to provide telephone exchange service, such as obtaining a certificate of convenience and necessity from the state commission, negotiating (and arbitrating, if necessary) an interconnection agreement with BOC, obtaining state approval of that agreement, filing and obtaining approval of a tariff for local exchange

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<sup>19/</sup> BellSouth Brief at 4 and 5.

service."<sup>20/</sup> Competitors also must obtain actual collocation facilities, physical interconnection and the unbundled elements or other services they need from ILECs.

In this light, BellSouth's claims regarding the progress of its potential competitors do not ring true. Mr. Wright's affidavit is filled with BellSouth's assumptions about the absence of development of local competition in South Carolina,<sup>21/</sup> but the facts do not conform to those assumptions. BellSouth's brief and Mr. Wright's affidavit demonstrate that progress towards true facilities-based competition actually is occurring in South Carolina. For instance, BellSouth acknowledges that potential competitors have taken a variety of steps towards meeting the Track A requirements, including (i) negotiating and arbitrating interconnection agreement; (ii) the filing by IT DeltaCom of a local exchange tariff indicating IT DeltaCom's intent to provide local exchange services in South Carolina and the approval of that tariff by the SCPSC; (iii) the provision of 288 interconnection trunks in South Carolina and some unbundled elements.<sup>22/</sup> BellSouth also is in the process of providing collocation.<sup>23/</sup> BellSouth even admits that "it is possible that some CLECs recently started to take reasonable steps to meet a specific near-

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<sup>20/</sup> *Oklahoma Order* at ¶ 43.

<sup>21/</sup> Wright Affidavit at ¶ 24 : "To the best of BST's knowledge as of September 19, 1997, no wire-line facility-based local exchange service competition had begun in South Carolina"; ¶ 25 : "BST fully expects that [...] facility-based offering will be generally available only to a select group of South Carolina businesses"; ¶ 27: "It is now BST's firm belief, supported by the historical growth patterns over the past year of wire-line facility-based local competition in 8 of the 9 states it serves, that residential wire-line facility based competition will never emerge on a widespread basis in South Carolina ... until competitive facility-based providers such as the major AACS are forced by market conditions... to provide such services."

<sup>22/</sup> BellSouth Brief at 34.

<sup>23/</sup> *Id.*



schedule for rolling out facilities-based residential service" and "that CLECs in South Carolina have begun to offer facilities-based service to residential as well as business subscribers."<sup>24/</sup>

While BellSouth argues that the Commission should defer to an SCPSC determination that competitors are not taking reasonable steps to provide facilities-based competition, that determination is not entitled to any deference. The SCPSC did not make any particularized findings as to each of the dozens of requesting carriers that BellSouth alleges are not taking reasonable steps to enter the local exchange service market, and, in fact, only discusses two of them.<sup>25/</sup> This "certification," as BellSouth calls it in its brief, also does not constitute the certification required from the state commission under Section 271(c)(1)(B) for the BOC to proceed under Track B. As the Commission determined in its *Michigan Order*, there can be no deference to a State commission that does not fulfill the obligation to support its determination with a detailed and extensive record.<sup>26/</sup>

### III. BELLSOUTH DOES NOT MEET THE CHECKLIST REQUIREMENTS

To meet the checklist requirement of Section 271(c)(2), a Bell company must meet each of the 14 elements of the checklist. BellSouth's application demonstrates that it fails to do so in several significant respects. Most importantly, BellSouth admits that it is choosing not to offer services in compliance with the requirements outlined by the Commission in the

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<sup>24/</sup> *Id.* at 15.

<sup>25/</sup> Order Addressing Statement and Compliance with Section 271 of the Telecommunications Act of 1996, Public Service Commission of South Carolina, Dkt. #97-101-C Order #97-640, rel. 7/31/97 ("*Compliance Order*").

<sup>26/</sup> *Michigan Order* at ¶ 30.

*Michigan Order*. BellSouth also improperly relies on interim prices and refuses to pay terminating compensation for calls to enhanced service providers.

**A. BellSouth Admits That It Does Not Meet Certain Requirements, and So Its Application Is *Per Se* Defective.**

At the outset, BellSouth admits that there are several areas in which it disagrees with the interpretations of the checklist under the *Michigan Order*, particularly regarding pricing and certain OSS performance measurements and standards. BellSouth urges the Commission "to review its position on the disputed issues and to look beyond these narrow disagreements about the meaning of the legislation to the broad effort BellSouth is making to accommodate competitive entry by CLECs."<sup>27/</sup>

The areas in which BellSouth has chosen not to comply are not narrow. To the contrary, OSS and pricing are crucial to the future of local competition in South Carolina. At the same time, the Commission is not empowered to make "good faith" exceptions to the checklist requirements. In fact, BellSouth's special pleading for its position is much less a good faith effort to comply than an effort to escape established regulatory requirements. By refusing to accept its legal obligations, BellSouth is effectively delaying competitive local entry in South Carolina. This is sufficient reason to deny its Section 271 application.

**B. The Application Cannot Be Granted Because It Relies on Interim Prices.**

BellSouth compounds its refusal to comply with the terms of the *Michigan Order* by seeking approval of its application while interim prices are in effect in South Carolina. The

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<sup>27/</sup> BellSouth Brief at 20-21.

Commission may not grant this, or any other application, unless and until permanent prices for all checklist items are in place.

The checklist requires first of all that a BOC seeking interLATA authorization comply with the interconnection requirements of Section 251(c)(2) and 252(d)(1). A key element of those requirement is that interconnection be provided on rates, terms and conditions that are determined by the relevant State commission to be nondiscriminatory and cost-based under the standards of Section 252(d). Although the Commission is required to consult with the relevant state commission pursuant to Section 271(d)(2), the Act gives the Commission exclusive responsibility for determining whether a BOC has complied with the checklist requirements. In this case, granting the application based on interim prices would create an opportunity for BOCs to evade the standards adopted by the Commission in the *Michigan Order*.

The SCPSC has approved BellSouth's interim rates as consistent with Section 252(d)(1) on the basis that nothing in the 1996 Act restricts a state commission's ability to approve rates as consistent with Section 252 prior to "final" cost proceedings. The Commission itself recognized in the *Local Competition Order* that interim rates are particularly important to jump start competition.<sup>28/</sup> However, this does not permit BOCs to enter the interLATA markets on the basis of rates that have not yet been found to be compliant with statutory cost standards and, for that matter, that have yet to be determined.

Interim prices do not comply with the checklist requirements because they provide no assurance that they will remain in effect. Moreover, interim prices are not necessarily cost-based

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<sup>28/</sup> Local Competition Order, 11 FCC Rcd at 15891.

and nondiscriminatory. Neither BellSouth's downward adjustment of its bills nor its guarantee that no retroactive payments will be required eliminate the risk that interim prices (and, later on, final prices) have not been (or will not be) based on costs and, therefore, are too high. As a practical matter, interim prices also deter market entry because they greatly increase the uncertainty faced by potential entrants. This uncertainty would be compounded if the Commission were to grant BellSouth's application because BellSouth would lose any incentive to cooperate in a proceeding to determine permanent prices. As a result, BellSouth has failed to meet items (i), (ii), (iv), (v), (vi), (x), (xiii) and (xiv) of the checklist.

**C. BellSouth's Refusal to Pay Terminating Compensation for Calls to Internet Service Providers is Inconsistent With Its Obligations Under the Checklist.**

The Commission also must consider BellSouth's efforts to avoid paying reciprocal compensation in this proceeding. As it admits in its brief, BellSouth has unilaterally determined that it will not pay terminating compensation for calls to enhanced service providers. This demonstrates the lack of good faith on the part of BellSouth when negotiating interconnection agreements with requesting carriers and shows that BellSouth continues to flex its power as the dominant LEC in its South Carolina service areas. Indeed, the BOCs' efforts to avoid paying compensation are an obvious reaction to their discovery that potential CLECs are targeting Internet service providers as customers. The CLECs have, among other things, designed business plans that assume they will be compensated for all of the local traffic they terminate. Not obtaining compensation will slow their entry on the local exchange service market.

BellSouth's refusal to pay reciprocal compensation also is contrary to the Congressional intent to bring the benefits of competition "to all Americans" and not just to these segments of

community designated by ILECs and the Commission's rules which require that information service providers be treated as if they are regular business users.<sup>29/</sup> In all meaningful respects, especially including the costs to the terminating carrier, a local call to an enhanced service provider is the same as any other local call. Denying compensation for certain kinds of traffic will slow the growth of CLECs and have an adverse effect on customers. Indeed, if compensation is not available for traffic terminated to certain types of customers, such as enhanced service providers, there will be less incentive to compete for their business because there would be less opportunity to recover the costs of serving them. As a result, LECs could either choose not to serve those customers or to serve them but impose higher costs on them.

This application is an opportunity for the Commission to affirm that ILECs should have no role whatsoever in determining what kinds of traffic are entitled to reciprocal compensation. At the very least, the Commission should uphold the Congressional intent to apply the reciprocal compensation obligation to all calls that originate and terminate within the local calling area, regardless of who the customers originating and terminating the calls may be and regardless of the service the customer purchase. Absent such a declaration, BellSouth will continue to seek loopholes in the reciprocal compensation obligation.

BellSouth's attempts to deny compensation for calls to enhanced service providers are particularly disturbing because they are consistent with the earlier ILEC pattern of attempting to leverage their market power to avoid paying compensation to other co-carriers, including CMRS

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<sup>29/</sup> See S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (defining purposes of 1996 Act).

providers.<sup>30/</sup> Even if this action were not a violation of BellSouth's checklist obligations, it would weigh heavily against BellSouth in the Commission's public interest determination in this proceeding.

#### **IV. BELLSOUTH DOES NOT MEET THE SEPARATE SUBSIDIARY REQUIREMENTS OF SECTION 272**

The application shows that, although BellSouth has established an affiliate, BellSouth Long Distance, Inc. (BSLD) to provide interLATA services, these two companies have not yet implemented the accounting requirements of Section 272. BellSouth even argues that "prior to receiving InterLATA authorization and establishing BSLD as a Section 272 affiliate, BellSouth and BSLD need not conduct transactions in accordance with the requirements of Section 272."<sup>31/</sup> BellSouth, however, does not specify with sufficient particularity if, how and when, following the granting of the application, the accounting requirements of Section 272 would be implemented.

The best way for the Commission to determine the likelihood that BellSouth will comply with Section 272 is to review BellSouth's behavior in preparing this application. Even assuming there is no requirement that it comply with Section 272 before the application is granted, the most probative evidence of whether BellSouth intends to comply is how it has acted in preparing and prosecuting this application. Thus, the Commission should examine

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<sup>30/</sup> See Local Competition Order, 11 FCC Rcd at §§ 16041, 16044.

<sup>31/</sup> See BellSouth Brief at 59.

how BellSouth has been treating the expenses of this application.<sup>32/</sup> If BellSouth has segregated those expenses, including all legal fees, costs of consultants and costs of setting up its long distance affiliate, and charged those expenses to its new long distance affiliate, then it is more likely to comply with the separate subsidiary requirement in the future. If BellSouth has not segregated those expenses, then the Commission will have *prima facie* evidence that BellSouth will not comply with Section 272 and should deny the application.

**V. BELLSOUTH HAS NOT DEMONSTRATED THAT GRANT OF ITS APPLICATION WOULD BE IN THE PUBLIC INTEREST**

The final issue the Commission must address before it can approve a Bell company's application for in-region interLATA authority is whether grant of the application would serve the "public interest, convenience and necessity."<sup>33/</sup> As is the case for each of the other Section 271 requirements, the Bell company bears the burden of demonstrating that it has met this requirement. BellSouth has not met its burden.

It is important to emphasize that the public interest determination is individualized. Unlike, for instance, rulemaking proceedings in which the Commission can determine that a course of action generally serves the public interest, there must be specific facts that demonstrate that, on the whole, the public interest will be served by granting the individual

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<sup>32/</sup> Any such examination should be based on BellSouth's activities prior to the date of the comments, not on any remedial action it might take after the comments are filed.

<sup>33/</sup> 47 U.S.C. § 271(d)(3)(c).

application under consideration.<sup>34/</sup> Thus, claims of generic benefits from Bell company provision of long distance service, including those proffered by BellSouth in this case, do not meet the requirements of the statute. Rather, the public interest test requires the Commission to balance the public interest benefits, if any, of long distance entry by BellSouth in South Carolina against the likely risks of such entry, including the risks of damage to local competition and of anticompetitive behavior in the long distance market.<sup>35/</sup> With the exception of the specific elements of the 14-point checklist, the Commission is empowered to weigh any factors it considers relevant in this analysis.<sup>36/</sup>

The risks of BellSouth's long distance entry into South Carolina are particularly great, as evidenced by the approach BellSouth takes in its application and by its behavior when it has entered previously-forbidden markets. Indeed, BellSouth uses the application to urge the Commission to permit it to engage in the same sort of anticompetitive marketing strategies it used when it introduced its MemoryCall voice mail service in Florida and Georgia.

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<sup>34/</sup> *Id.* (Commission must find "the requested authorization" to be in the public interest.)

<sup>35/</sup> The Commission may not, however, employ a "balancing test" that offsets a Bell company's failure to comply with one or more of the other requirements of Section 271 against a determination that long distance entry would be in the public interest. As Section 271 makes clear, each of the elements of the entry test must be satisfied independently. *See* 47 U.S.C. § 271(d)(3).

<sup>36/</sup> *See* 47 U.S.C. § 271(d)(4). Thus, the Commission can consider whether local competition has developed sufficiently to serve as a bulwark against anticompetitive behavior by the Bell company, regardless of whether the Bell company is proceeding via Track A or Track B. Similarly, the Commission can consider whether the separate subsidiary safeguards of Section 272 will be sufficient in a particular case in light of the Bell company's past behavior.



Moreover, BellSouth has shown in this application that it does not intend to comply with Commission rules now or in the future, and BellSouth will have significant opportunities to engage in anticompetitive behavior.

**A. BellSouth's Behavior in the Offering of MemoryCall Demonstrates that Grant of the Application Is Not in the Public Interest.**

MemoryCall is particularly important to this proceeding because BellSouth specifically was determined to have acted in an unlawful and anticompetitive fashion by two different regulatory authorities – the Georgia Public Service Commission and this Commission. As documented by the Georgia PSC and the Commission, when BellSouth began offering MemoryCall soon after it first was permitted to do so by the MFJ Court, it engaged in a series of activities that plainly were intended to monopolize the voice mail marketplace.

The Georgia PSC found, among other things, that BellSouth had (1) deployed network technologies in a way that made it difficult for existing voice mail providers to compete with MemoryCall; (2) adopted policies that prevented competing voice mail providers from offering “one stop shopping” for voice mail service, while at the same time permitting MemoryCall to be purchased in a single transaction; and (3) engaged in “unhooking,” that is, the practice of seeking to steal customers from other voice mail providers when those customers called to order services that were necessary to use voice mail (and, indeed, services that had few practical uses outside of the context of voice mail).<sup>37/</sup> These practices

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<sup>37/</sup> See Commission Investigation into Southern Bell Telephone and Telegraph Company's Trial Provision of Memory Cell Service, Docket No. 4000-U. (Gr. Pub. Svs. Com. June 4, 1991) § 27-34.